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Supreme Court, U.S.
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No. 96-1937

IN THE

Supreme Court of the United States

October Term, 1996

JACKSON SQUARE ASSOCIATES,
a New York Limited Partnership,
Petitioner,

vs.

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, Buffalo Office-Region II,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

JOHN J. PHELAN
Counsel of Record
716 Brisbane Building
Buffalo, New York 14203
Telephone: (716) 855-2600
Attorney for Petitioner

TIMES APPELLATE PRINTING, INC.—Telephone (716) 344-2000

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PETITIONER'S REPLY TO THE NEW QUESTION AND NEW ISSUES IN RESPONDENT'S BRIEF

The Contrasting Statements of the Case.

The Statement of the Case by petitioner described an informal agency adjudication, an order per 5 U.S.C. Sec. 551(6), by the Assistant Secretary of HUD required by an Act of Congress, 42 U.S.C. Sec. 1437f(c)(1) (A52).

The Statement of respondent described the agency staff rationale to vary the Secretary's order as a special adjustment of the project rents during operation. 24 CFR 880.201 *et seq.* (A54).

The Secretary's final informal adjudication corrected a processing error (A64) pursuant to a request from the Buffalo Area Manager to correct a processing error (A61). A processing error correction is a well accepted event resulting in rent adjustments *Terrance Housing Associates vs. Cisneros,* 32 F3d 461 (10th Cir. 1994), 24 CFR 882.507(c) and 880.408(d)(1).

The petitioner's and the respondent's statements demonstrate the factual contentions of the parties framing the issue of Congressional intent in the mandate to the Secretary of HUD in 42 U.S.C. Sec. 1437f(c)(1).

The Secretary's order corrected a processing error of $45,080 per year in petitioner's Housing Assistance Payments (HAP) contract (A64).

The agency staff purported to make an operating special adjustment of $13,450 per annum in petitioner's HAP contract (A14-A17).

Further respondent raises new matter contending petitioner is not entitled to a jury trial, an issue decided below in favor of petitioner (SA1-SA12) and not appealed and further new matter justifying the unrefuted racial and religious discrimination by agency staff (A58-A60, A18) by the new claim that the conduct of the guilty agency staff was required by the statute (Resp. br. 8).

REASONS IN REPLY FOR GRANTING THE WRIT.

I. The District Court Held This Is Not A Case Of Waiver Of United States Sovereign Immunity As Respondent Contends. HUD Did Not Appeal.

(a) Respondent urges that *Lehman vs. Nakshian,* 453 U.S. 156 (1981) controls petitioner's right to a jury trial because this case involves a waiver of sovereign immunity by the United States and the Congress did not expressly provide for a jury trial in the statute waiving sovereign immunity (42 U.S.C. Sec. 1404a).

The District Court in this case has decided that petitioner's suit for breach of contract against respondent authorized in 42 U.S.C. Sec. 1404a does not involve a waiver of sovereign immunity by the United States. *Jackson Square Associates vs. U.S. Dept. of Housing and Urban Development,* 797 F.S. 242 (WDNY 1992) (SA1-SA11).

The District Court held that 42 U.S.C. Sec. 1404a is a waiver of sovereign immunity by the Secretary of the U.S. Dept. of Housing and Urban Development (HUD) pertaining to 42 U.S.C. Sec. 1437f, a waiver of sovereign immunity limited to the funds in the control of such Secretary and is a suit cognizable in U.S. District Court and not in the Court of Claims. *Jackson Square, supra*

(SA1-SA11). The authority for the District Court decision is *C.H. Sanders vs. BHAP Housing Development Fund Company,* 903 F2d 114 (2d Cir. 1990).

The right to a jury trial is an incident of the grant of exclusive jurisdiction in the District Courts. *United States vs. Pfitsch,* 256 U.S. 547 (1921) cited by Justice Brennan in dissent (Pg. 175) in *Lehman vs. Nakshian, supra.*

Respondent did not appeal from that order. It is the law of the case.

(b) Respondent urges that petitioner did not raise the claim of a jury trial earlier in the case.

Petitioner demanded a jury trial in its amended complaint dated November 15, 1990 (SA12) and urged in the Courts below that petitioner was entitled to a trial of the issues of its breach of the Housing Assistance Payments (HAP) contract cause of action (A35-A37). Respondent has not moved to strike petitioner's demand for a jury trial. Fed. Rules of Civ. Prac. 39(a), *Lehman vs. Nakshian, supra.*

(c) Petitioner urges that the decision of the District Court in *Jackson Square, supra* (SA1-SA11) following *C.H. Sanders, supra,* that 42 U.S.C. Sec. 1404a contains a waiver of sovereign immunity of HUD and not the United States and that this is a case cognizable in U.S. District Court and not in the Court of Claims are issues in which there is a conflict among the U.S. Courts of Appeal demonstrated by *Portsmouth Redevelopment & Housing Authority vs. Pierce,* 706 F2d 471 (4th Cir.) *cert. denied* 464 U.S. 960 (1983). This Court should grant review of such issues in this case.

II. The District Court Made Its Decision In Violation Of A Congressional Mandate. Respondent Avoids The Issue.

This is a case in which a HUD Secretary made an informal agency adjudication (A64), a 5 U.S.C. Sec. 551(6) order and agency field office staff did not carry it out (A14-A17). Agency staff overruled the Secretary.

The District Court confronted the issue squarely and held that because Congress did not prohibit agency staff from overruling the HUD Secretary when it mandated that a decision be made by him (42 U.S.C. Sec. 1437f), agency staff was authorized to change his order (A22).

That is an issue of Congressional intent that this Court should review.

Respondent attempts to avoid the issue by referring to HAP contract operating adjustments (Resp. br. 3,4). The Secretary corrected an original processing error in the original contract rents (A64). He said so (A71). His decision had nothing to do with an AAAF adjustment. He said so (A72). The special adjustment claim (24 CFR Sec. 880.110(c) (A54)) was an agency staff rationale for overruling the HUD Secretary (A14-A17).

The issue for review by this Court is Congressional intent under 42 U.S.C. Sec. 1437(c)(1) and whether the Congressional failure to prohibit agency staff from overruling a Secretary's order pursuant to 5 U.S.C. Sec. 551(6) authorized agency staff to vary that order as the District Court held it was authorized to do (A22).

III. *Cisneros vs. Alpine Ridge Group,* 508 U.S. 10 (1993) Compels Respondent To Justify Agency Staff Overruling Its Secretary.

Petitioner's contract right to the AAAF increase of March 13, 1980 was fixed by *Cisneros vs. Alpine Ridge Group,* 508 U.S. 10 (1993).

Cisneros vs. Alpine Ridge Group, supra, compels respondent to concede the March 13, 1980 AAAF increase and to argue that agency staff overruled the Secretary by reducing his order correcting the processing error from $46,080 per annum to $13,450 per annum (Resp. br. 8, A14).

Thus respondent argues agency staff were authorized to vary the Secretary's order of August 29, 1980 by reducing his award to petitioner from $46,080 per annum to $13,450 per annum (A14), the amount of the six months earlier AAAF increase (A12). The HUD Secretary explanation of his order (A64) was that it had nothing to do with the AAAF increase (A72). This is an issue of agency power and right which affects more than this case and more than HUD. It should be reviewed by this Court.

IV. Unrefuted Racial And Religious Discrimination Should Not Be Tolerated In Federal Decision Making.

Agency staff exercised alleged discretionary power to vary a Secretary's order (A14) in a case in which racial and religious discrimination by the key field officer was established by the affidavit of a fellow HUD employee and unrefuted (A58-A60, A18).

This Court has held repeatedly that when evidence of invidious discrimination has been produced, and the party charged does not come forward with a neutral

explanation for the conduct, the tainted decision will be reversed. In this case HUD was ordered to provide a neutral explanation and failed to do so (A18). *Batson vs. Kentucky,* 476 U.S. 79 (1980); *Casteneda vs. Pastida,* 430 U.S. 482 (1977); *Village of Arlington Heights vs. Metro Housing Division,* 429 U.S. 252 (1977).

Respondent seeks to avoid the tainted agency staff decision by its new claim that it was a "required" decision (Resp. br. 8). The argument is unworthy.

The issue deserves review by this Court.

CONCLUSION

For the reasons set forth in the Petition for Certiorari and for the reasons set forth in this Reply to the Brief in Opposition, the Petition for a Writ of Certiorari should be granted.

Dated: August 13, 1997
Buffalo, New York

Respectfully submitted,

JOHN J. PHELAN, ESQ.
Attorney for Petitioner
716 Brisbane Building
Buffalo, New York 14202
Telephone: (716) 855-2600

SUPPLEMENTAL APPENDIX

Decision and Order of Honorable John T. Curtin, United States District Judge, Dated August 10, 1992.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

ATTEST: A TRUE COPY
U.S. DISTRICT COURT, WDNY
RODNEY C. EARLY, CLERK
By J. McCARTHY
Deputy Clerk
Original Filed 8-11-92

88-CV-859C

JACKSON SQUARE ASSOCIATES,
a New York Limited Partnership,

Plaintiff,

-vs-

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT,
Buffalo Office—Region II,

Defendant.

APPEARANCES:

JOHN J. PHELAN, ESQ., Buffalo, New York, for Plaintiff.

DENNIS C. VACCO, ESQ., United States Attorney (SUSAN W. SCHOEPPERLE, ESQ., Assistant United States Attorney, of Counsel), Buffalo, New York, for Defendant.

BACKGROUND

This case stems from a dispute over the amount of payments due under a Housing Assistance Payments ("HAP") contract between plaintiff, Jackson Square Associates ("Jackson Square"), and defendant, the United States Department of Housing and Urban Development ("HUD"). Several motions are pending. First, plaintiff has moved to strike several affirmative defenses offered by defendant. Item 12. Second, plaintiff has moved to amend its complaint. Item 17. Third, defendant has moved to dismiss the complaint or have the case transferred to the Claims Court, pursuant to 28 U.S.C. §1631, for lack of subject matter jurisdiction in this court. After a brief review of the facts, the court will address each motion in turn.

FACTS

Jackson Square owns a 160-unit low-income housing development in the Town of Amherst, New York. Effective March 13, 1979, Jackson Square entered into a HAP contract with HUD, pursuant to 42 U.S.C. §1437f, under which HUD agreed to make rental assistance payments to Jackson Square for the development's eligible tenants. *See* Item 17, Exh. 1 (HAP contract). Included within the contract was an allowance for the expected utility expenses of Jackson Square. *Id.* Shortly after commencement of the contract, however, it was determined that a mistake had been made which caused Jackson Square's utility expenses to be greatly underestimated. On July 17, 1979*, the Buffalo area office of HUD recommended to the national HUD office that Jackson Square's utility allowance should be adjusted upward by $24 per month, per unit. Item 17, Exh. 2. By letter of August 29, 1979*, this

* District Court Error. 1979 Should be 1980 (A10, A12).

requested increase was apparently approved by Lawrence B. Simons, Assistant Secretary for HUD in Washington, D.C. Item 17, Exh. 3. Plaintiff alleges that this adjustment was never made. It seeks damages of several hundred thousand dollars to cover past and future alleged shortfalls. *See* Item 17 (proposed amended complaint).

DISCUSSION

Plaintiff has moved to strike four of the six affirmative defenses contained in defendant's answer. Item 12. Defendant does not object to having its sixth defense—failure to exhaust administrative remedies—stricken, but opposes the motion for the other three defenses. Item 21, ¶6. Plaintiff's motion is denied. *See National Union Fire Ins. Co. of Pittsburgh v. Alexander,* 728 F. Supp. 192, 203 (S.D.N.Y. 1989).

Plaintiff has also moved to file an amended complaint. Item 17. "[L]eave [to amend a complaint] shall be freely given when justice so requires." Fed. R. Civ. P. 15(a). *See Foman v. Davis,* 371 U.S. 178, 182 (1962); *Ryder Energy Distribution v. Merrill Lynch Commodities,* 748 F.2d 774, 783 (2d Cir. 1984). In order to adequately test the merits of plaintiff's complaint, this motion is hereby granted.

That brings the court to the main issue currently before it, *viz.,* whether this court has jurisdiction over plaintiff's amended complaint or whether, under the Tucker Act, 28 U.S.C. §1346(a)(2), the case must be transferred to the Claims Court. Before proceeding, however, the court cautions that the case law in this area appears to lead toward contradictory conclusions.

Many, if not most, courts have concluded that jurisdiction under the Tucker Act is exclusive in the United States Claims Court, pursuant to 28 U.S.C. §1346(a)(2), if three conditions are met:

> (1) the action is against the United States;
> (2) the action is founded upon the Constitution, federal statute, executive regulation, or government contract; and (3) the action seeks monetary relief in excess of $10,000.

Amoco Prod. Co. v. Hodel, 815 F.2d 352, 359 (5th Cir. 1987), *cert. denied*, 487 U.S. 1234 (1988). *See United States v. Hohri*, 482 U.S. 64, 66 n.1 (1987); *Alan Guttmacher Inst. v. McPherson*, 805 F.2d 1088, 1096 (2d Cir. 1986); *A.E. Finley & Assoc., Inc. v. United States*, 898 F.2d 1165, 1167 (6th Cir. 1990); *Weeks Constr., Inc. v. Oglala Sioux Hous. Auth.*, 797 F.2d 668, 675 (8th Cir. 1986); *Hahn v. United States*, 757 F.2d 581, 586 (3d Cir. 1985); *Portsmouth Redevelopment & Hous. Auth. v. Pierce*, 706 F.2d 471, 473 (4th Cir.), *cert. denied*, 464 U.S. 960 (1983); *Homewood Corp. v. Kemp*, 786 F. Supp. 1315, 1318-19 (S.D. Ohio 1992); *Carlyle Gardens Co. v. Delaware State Hous. Auth.*, 659 F. Supp. 1300, 1307 (D. Del. 1987). *Cf. Tennesee ex rel. Leech v. Dole*, 749 F.2d 331, 335 (6th Cir. 1984), *cert. denied*, 472 U.S. 1018 (1985) (concluding that Claims Court jurisdiction was exclusive only for suits "founded on contract" involving more than $10,000). More importantly, for the most part these cases also hold that to satisfy the first condition,

> [i]t is not necessary that the United States be denominated as a party. An action against a federal agency or official will be treated as an action against the sovereign if "the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration, or if the effect of the judgment would be to restrain the Government from acting, or compel it to act."

Portsmouth Redevelopment & Hous. Auth., 706 F.2d at 473 (quoting *Dugan v. Rank*, 372 U.S. 609, 620 (1963)). *See also Amoco Prod. Co.*, 815 F.2d at 359; *B.K. Instrument, Inc. v. United States*, 715 F.2d 713, 723-24 (2d Cir. 1983). Thus, under this line of analysis, the first inquiry for a district court is to determine the source of funds sought to be recovered by plaintiff in its action. If the judgment sought could be paid out of separate funds in the control of the federal agency sued, the suit would not be against the sovereign. *E.g., Weeks Constr., Inc.*, 797 F.2d at 675 & n.9; *Industrial Indem. Inc. v. Landrieu*, 615 F.2d 644, 646 (5th Cir. 1980); *Marcus Garvey Square, Inc. v. Winston Burnett Constr. Co. of Cal.*, 595 F.2d 1126, 1131 (9th Cir. 1979); *Carlyle Gardens Co.*, 659 F. Supp. at 1304. But if the judgment sought could only come from the public treasury, then the suit must be considered to be against the United States. *E.g., Dugan v. Rank*, 372 U.S. at 620; *Amoco Prod. Co.*, 815 F.2d at 359; *Portsmouth Redevelopment & Hous. Auth.*, 706 F.2d at 473. If the suit is determined to be against the United States and the other two conditions are also satisfied, the suit must be dismissed by the district court, or transferred to the Claims Court. *Amoco Prod. Co.*, 815 F.2d at 368; *Portsmouth Redevelopment & Hous. Auth.*, 706 F.2d at 475.

The Second Circuit, in the recent case of *C.H. Sanders Company v. BHAP Housing Development Fund Company*, 903 F.2d 114, 119 (2d Cir. 1990), has undertaken an analysis somewhat different from the cases cited above. Under *Sanders*, jurisdiction may be found in a district court if two conditions are satisfied: First, there must be a grant of subject matter jurisdiction; and second, there must be a valid waiver of sovereign immunity. *Id.* at 117. *See also Falls Riverway Realty v. City of Niagara Falls*, 754 F.2d 49, 54 (2d Cir.

1985); *S.S. Silberblatt, Inc. v. East Harlem Pilot Block—Bldg. 1 Hous. Dev. Fund Co.*, 608 F.2d 28, 35 (2d Cir. 1979); *FHM Constructors, Inc. v. Village of Canton Hous. Auth.*, 779 F. Supp. 677, 680 (N.D.N.Y. 1992); *Lattimore v. Northwest Coop. Homes Ass'n*, 1992 WL 118383 (D.D.C. May 19, 1992); *Ghent v. Lynn*, 392 F. Supp. 879, 880-81 (D. Conn. 1975).

The Tucker Act satisfies both requirements with respect to non-tort claims " 'against the United States . . . founded . . . upon any express or implied contract with the United States.' " *Sanders*, 903 F.2d at 119 (quoting 28 U.S.C. §1346(a)(2)). The Tucker Act, however, only permits such actions in district court if the amount sought is $10,000 or less. *Id.* Actions may be brought in the Claims Court for any amount. *Id.*; 28 U.S.C. §1491(a)(1).

In *Sanders*, as here, the government argued that these statutory provisions established *exclusive* jurisdiction in the Claims Court for claims exceeding $10,000. The Second Circuit, however, rejected this argument.

> We hold that an action (regardless of the amount sought) may be commenced under [28 U.S.C.] §1331 in the district court provided there is an independent waiver of sovereign immunity outside the Tucker Act.

Sanders, 903 F.2d at 119. The court explained:

> "Most claimants against the government rely on the Tucker Act for the waiver of sovereign immunity that would otherwise preclude their suits. When such a claimant attempts to sue in a district court . . . he encounters the Tucker Act's $10,000 maximum, and his claim therefore fails as an unconsented suit against the sovereign. Hence it is commonly said that suits against the government for more than $10,000 are in the exclusive jurisdiction of the Court of Claims. . . . *In fact, the jurisdiction of the Court of*

> *Claims is not exclusive; rather, there is rarely any statute available that waives sovereign immunity for suits in the district court, other than the Tucker Act with its $10,000 limit."*

Id. (quoting *Ghent v. Lynn*, 392 F. Supp. at 881 (citations omitted)) (emphasis in *Sanders*). *See also Bowen v. Massachusetts*, 487 U.S. 879, 910 n.48 (1988) (Claims Court jurisdiction is exclusive "only to the extent that Congress has not granted any other court authority to hear the claims that may be decided by the Claims Court."); *Western Sec. Co. v. Derwinski*, 937 F.2d 1276, 1279 (7th Cir. 1991) (same). Thus, a district court's first inquiry is not to determine the source of the funds sought by plaintiff, *see supra*, but to determine whether statutes outside the Tucker Act can provide plaintiff with an independent grant of subject matter jurisdiction and a waiver of sovereign immunity. *Sanders*, 903 F.2d at 117. This court will now undertake that inquiry.

Plaintiff seeks subject matter jurisdiction under 28 U.S.C. §1331, which states: "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, law, or treaties of the United States." It claims that this action arises under 42 U.S.C. §1437f, pursuant to which the HAP contract was formed, and federal common law. The court agrees. "Suits to enforce contracts with federal agencies are governed by federal common law . . . and as a result arise under federal law for purposes of section 1331." *Derwinski*, 937 F.2d at 1280 (citations omitted). *See FHM Constructors*, 779 F. Supp. at 680-81 (finding subject matter jurisdiction under §1437 and other statutes).[1] Accordingly, the court concludes that it has subject matter jurisdiction over this suit.

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[1] *But see 1610 Corp. v. Kemp*, 753 F. Supp. 1026, 1030-32 (D. Mass. 1991) (concluding that contract action does not arise under federal law for purposes of §1331 jurisdiction).

That brings me to the question whether HUD has consented to suit in the district court. Plaintiff relies on 42 U.S.C. §1404a, which states in part: "The Secretary of Housing and Urban Development *may sue and be sued* only with respect to its functions under the United States Housing Act of 1937, as amended [42 U.S.C.A. §1437 *et seq.*] . . . ." (emphasis added). There is little doubt that plaintiff's suit, which is based on its HAP contract with HUD, is a suit "with respect to [HUD's] functions under" 42 U.S.C. §1437 *et seq.* Accordingly, the court holds that §1404a provides a waiver of sovereign immunity permitting plaintiff's suit *against HUD* in this court. At least two courts have drawn an identical conclusion based on §1404a. *FHM Constructors,* 779 F. Supp. at 681-82; *Lattimore,* 1992 WL 118383.

The above holdings do not, however, end the court's analysis. In fact, they merely bring the court to the juncture that distinguishes the Second Circuit's analysis in *Sanders* from that of most other circuits in the country. In *Sanders,* the court asked *first* whether jurisdiction existed. Having concluded that it did, it reversed the district court's contrary conclusion and remanded for a determination on the merits. *Sanders,* 903 F.2d at 120. The *Sanders'* court then added this critical instruction on remand:

> If the court determines that HUD is liable for the arbitration award, it need not engage in a further analysis of the source of the funds that would be used to satisfy its judgment—i.e., from general Treasury funds or funds within the discretion and control of the Secretary. The court should simply direct the Secretary to satisfy the judgment out of funds that are within his control, assuming, of course, that such funds exist. It is only as to such funds that the Secretary's immunity has been waived. *See F.H.A. v. Burr,* 309 U.S. 242, 250-51 (1940); *Silberblatt, supra,* 608 F.2d at 36.

Sanders, 903 F.2d at 120. *See also Far West Fed. Bank v. Director, Office of Thrift Supervision*, 930 F.2d 883, 890 (Fed. Cir. 1991); *Ensign Fin. Corp. v. Federal Deposit Ins. Corp.*, 785 F. Supp. 391, 401 (S.D.N.Y. 1992); *FHM Constructors*, 779 F. Supp. at 681. Thus, under *Sanders*, a district court deciding whether jurisdiction exists need never determine the source of funds sought to be recovered by plaintiff in its action; whereas, in most other circuits, this is the first question that is asked. *See, e.g., Amoco Prod. Co.*, 815 F.2d at 359; *Weeks Constr., Inc.*, 797 F.2d at 675 & n.9; *Portsmouth Redevelopment & Hous. Auth.*, 706 F.2d at 473.

This difference is critical to a determination whether a claim may be brought in district court, or must be brought in the Claims Court. If a court first asks—where are the funds to satisfy judgment likely to come from, the agency or the federal treasury?—and decides the answer is the latter source, then the suit is considered to be against the United States and must be transferred to the Claims Court, because no independent waiver of sovereign immunity exists, outside the Tucker Act, for claims *against the United States*. This is the approach taken by the circuits cited at the beginning of this discussion. *See, e.g., Amoco Prod. Co.*, 815 F.2d at 359; *Weeks Constr., Inc.*, 797 F.2d at 675 & n.9; *Portsmouth Redevelopment & Hous. Auth.*, 706 F.2d at 473.[2] In *Sanders*, on the other hand, the Second Circuit proceeded on the assumption that the suit was against the Secretary of HUD, not against the United States, and asked whether *HUD* had waived its sovereign immunity.

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[2] Indeed, there is precedent in the Second Circuit which would hinge the waiver of sovereign immunity on an initial determination whether the action was against the agency or against the United States. *Falls Riverway Realty*, 754 F.2d at 55-56.

The court concluded that HUD had waived its immunity, and thus held that jurisdiction was proper in the district court. *Sanders*, 903 F.2d at 119-20. The court, however, then noted that the scope of HUD's waiver of immunity was limited by the extent to which the Secretary could satisfy a judgment "out of funds that are within his control, *assuming, of course, that such funds exist.*" *Id.* at 120 (emphasis added). *See also Silberblatt*, 608 F.2d at 36 ("For a claim to be against the Secretary, and therefore within the scope of the 'sue and be sued clause,' as opposed to a suit against the United States, any judgment for plaintiff must be out of funds in the control of the Secretary as distinguished from general Treasury funds."). If HUD has no funds "severed from Treasury funds and Treasury control," *F.H.A. v. Burr*, 309 U.S. at 250, plaintiff will simply be unable to collect, even if, ultimately, it is successful in winning a judgment against HUD. *C.H. Sanders Co., Inc. v. BHAP Hous. Dev. Co.*, 910 F.2d 33, 33 (2d Cir. 1990); *Far West Fed. Bank*, 930 F.2d at 890; *Ensign Fin. Corp.*, 785 F. Supp. at 401 n.5.[3]

The distinction offered by *Sanders* also disposes of language in §1346(a)(2) which divests jurisdiction from a district court for "any civil action or claim against the United States founded upon any express or implied contract with the United States ...." 28 U.S.C. §1346(a)(2). *See Chemung County v. Dole*, 781 F.2d 963, 967 (2d Cir. 1986) ("The Contract Disputes Act (CDA) of 1978, 41 U.S.C. §601 *et seq.* (1982), amended the Tucker Act, 28 U.S.C. §1491 (1982), and removed district court

[3] Although the court takes no position at this time as to whether HUD has access to funds severed from treasury control, other courts have apparently drawn opposite conclusions on this point. *Compare Portsmouth Redevelopment & Hous. Auth.*, 706 F.2d at 473-74 (holding that there is no separate fund within HUD's control), *with Lattimore*, 1992 WL 118383 (noting plaintiff's identification of a separate HUD fund).

jurisdiction over actions or claims against the United States, regardless of the amount in controversy, when founded upon an express or implied fact contract with the federal government."). Here, the suit is against HUD, not the United States. Recovery may be made only against the former entity, not the latter.

For the foregoing reasons, the court holds that it has subject matter jurisdiction, defendant HUD has waived its sovereign immunity, and, pursuant to plaintiff's amended complaint, the suit may proceed in this court.

The court will meet with counsel on August 18, 1992, at 9 a.m. to be advised as to what further steps shall be taken in this litigation.

So ordered.

s/ JOHN T. CURTIN
John T. Curtin
United States District Judge

Dated: August 10, 1992

Excerpt of Amended Complaint,
Dated November 15, 1990.

* * *

[8] agency action to which plaintiff was entitled and to perform the housing assistance payments contract as modified between the parties.

DATED: Buffalo, New York
November 15, 1990

Yours, etc.

MOOT & SPRAGUE
s/ By JOHN J. PHELAN
John J. Phelan
Attorneys for Plaintiff
2300 Empire Tower
Buffalo, New York 14202
(716) 845-5200

PLEASE TAKE NOTICE that the plaintiff demands a jury trial of the causes of action contained in the within action.